

SESSION OF 2011

**SUPPLEMENTAL NOTE ON SUBSTITUTE FOR HOUSE
BILL NO. 2069**

As Recommended by House Committee on
Judiciary

Brief*

Sub. for HB 2069 would create the Kansas Adverse Medical Outcome Transparency Act. It would allow a health care administrator to convene a facilitated conference involving a health care provider or providers, the health care administrator, and a patient allegedly experiencing an adverse outcome of medical care, the patient's family, or the patient's representative. The purpose of the facilitated conference would be to allow the health care provider or health care administrator to express benevolence, sorrow, regret, mistake, error, sympathy, apology, commiseration, condolence, compassion, or a general sense of benevolence. Attorneys for the health care provider or providers, health care administrator, and the patient allegedly experiencing an adverse outcome of medical care, the patient's family, or the patient's representative would be allowed to attend with the approval of the participants as recorded in a written agreement signed by the participants. The bill would disallow electronic recording of the conference.

Pursuant to the bill, in a civil claim or action concerning the alleged adverse outcome of medical care, any verbal statements made in the facilitated conference and waiver of medical care charges would be inadmissible as evidence and would not constitute an admission of liability or a statement against interest. Further, the fact that a facilitated conference was or was not convened would not be admissible. The bill would allow the defendant to waive in writing the

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

inadmissibility of statements attributed to the defendant. It also would provide that waiver could not be construed as failure to assist the defendant's medical malpractice provider with the defense of the claim.

The bill also would define some key terms.

Background

In 2009, at the request of the Sisters of Charity of Leavenworth Health System (Sisters of Charity), Senator Jim Barnett introduced SB 32, which was based on a Colorado statute. The bill would have prohibited a court from admitting oral or written statements or notations, affirmations, gestures, conduct, or benevolent acts made by a health care provider relating to the unanticipated outcome of medical care as evidence of an admission of liability in civil actions. Included in this prohibition were waivers of charges for medical care and expressions of apology, fault, sympathy, or condolence. The bill had a hearing in the Senate Judiciary Committee and subsequently was referred to the Judicial Council for study.

The Judicial Council's Advisory Committee (Advisory Committee) considered similar laws from other states, relevant academic and law review articles, and the testimony submitted to the Senate Judiciary Committee and found it did not support the approach taken by SB 32. Specifically, the Advisory Committee agreed that the statements or expressions of fault should not be excluded and the law should apply more broadly than just to health care providers. Further, the Advisory Committee discussed the approaches taken by other states to determine whether a mixed statement of apology and liability is inadmissible and adopted Hawaii's stance. Its statute provides that exclusion is not required when an apology or other statement acknowledging or implying fault is part of a statement or gesture that is inadmissible. Haw. Rev. Stat. § 626-1, Rule 409.5. This provision gives trial court judges discretion on that issue.

In the 2010 Legislative Session, SB 374, which was based on the Hawaii statute, was introduced as recommended by the Advisory Committee. It would have provided that evidence of statements or gestures that express apology, sympathy, commiseration, or condolence concerning the consequences of an event in which the declarant was a participant is not admissible to prove liability for any claim growing out of the event. The language described above giving judges discretion to determine the admissibility of mixed statements also was included in the bill. In the Senate Judiciary Committee, Sisters of Charity proposed alternative language based on a South Carolina law, which was ultimately adopted.

The substitute bill, which was identical to HB 2069 as introduced, was rereferred by the Senate Committee of the Whole to the Senate Judiciary Committee, where no further action was taken. The 2010 Special Committee on Judiciary looked at all three versions of the apology bill and adopted the Kansas Judicial Council's approach to an apology law, 2010 SB 374.

HB 2069 as introduced would have created the Kansas Adverse Medical Outcome Transparency Act, making inadmissible, in any claim or civil action brought by or on behalf of a patient alleging an adverse outcome of medical care, any and all statements, activities, waivers of charges for medical care, or other conduct expressing benevolence, regret, mistake, error, sympathy, apology, commiseration, condolence, compassion, or a general sense of benevolence made by a health care provider or a provider's employee or agent. Further, pursuant to the bill, such statements or conduct would not have constituted an admission of liability or an admission against interest. Finally, the bill would have allowed a defendant in a medical malpractice action to waive, in writing, the inadmissibility of such statements.

In the House Committee on Judiciary, representatives of Sisters of Charity, University of Kansas Hospital, the Kansas Hospital Association, the Kansas Association of Osteopathic

Medicine, and the Kansas Veterinarians Medical Association, in addition to a local attorney, presented testimony in support of the bill. The Committee also received written testimony in support of the bill from the Kansas Medical Society, Via Christi Health, and Saint Luke's Health System. Representatives of Kansas Advocates for Better Care, the Kansas Bar Association, the Kansas Association for Justice, and AARP presented testimony opposing the bill.

The House Committee amended the bill by adopting the substitute bill described above.

Both the Health Care Stabilization Fund and the Board of Healing Arts indicate that passage of HB 2069 as introduced would have no fiscal effect.